

Exhibit 5

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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ALEX ANG and LYNNE STREIT,
16 individually and on behalf of all others
similarly situated,

17 Plaintiffs,

18 v.

19 BIMBO BAKERIES USA, INC.,
20 Defendant.

Case No. CV13-01196-HSG (NC)

**DECLARATION OF DR. DONALD M. MAY
IN SUPPORT OF PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION, FOR
APPOINTMENT OF CLASS
REPRESENTATIVES, AND FOR
APPOINTMENT OF CLASS COUNSEL**

1 I, Dr. Donald M. May declare and state that:

2 1. I have been asked by counsel for plaintiffs to provide a declaration in support
3 of class certification.

4 2. I hold a Bachelor of Science in Business Administration (BSBA) degree in
5 accounting from the Roosevelt University, a Master of Business Administration (MBA)
6 degree in statistical methods and finance from the University of Chicago Graduate School of
7 Business (now the Booth School of Business), and a Doctor of Philosophy (PhD) in Finance
8 and Economics from the University of Chicago Graduate School of Business. I have passed
9 the Certified Public Accountant (CPA) exam in the State of Illinois.

10 3. I was a professor of Accounting, Finance and Economics at the Massachusetts
11 Institute of Technology Sloan School of Management, where I conducted research and
12 taught classes on financial statement analysis, finance research methods, statistics, and
13 valuation.

14 4. I have spent over 25 years analyzing and opining on valuations and damages
15 in both litigation and non-litigation contexts and across numerous industries.

16 5. A list of references used for this declaration is shown in Appendix A. A copy of
17 my *curriculum vitae*, which includes publications over the past 10 years is attached as
18 Appendix B to this declaration, and a list of cases where I been deposed or testified in court
19 or arbitration over the past four years is attached as Appendix C to this declaration.

20 6. I am being compensated at a rate of \$525 per hour and my fee is not
21 contingent upon the findings or opinions I express or will express in this matter.

22 7. I have reviewed the Second Amended Complaint of Plaintiffs Alex Ang and
23 Lynne Streit ("Plaintiffs") against Bimbo Bakeries USA, Inc. ("Bimbo Bakeries" or
24 "Defendant"). I have also reviewed relevant information on products from Bimbo Bakeries
25 website.

26 8. According to the second amended complaint, and my review of Bimbo
27 Bakeries website, Defendant is the largest bakery company in the United States. Defendant
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owns and distributes numerous leading bakery brands in the United States, including, Arnold, Ball Park, Bimbo, Boboli, Brownberry, Earthgrains, Entenmann's, Francisco, Freihofer's, Marinela, Mrs. Baird's, Oroweat, Sara Lee, Stroehman, Thomas', and Tia Rosa.

9. According to the second amended complaint, Defendant makes the following misrepresentations regarding products produced by various Bimbo Bakery brands:

- The label of Defendant's Thomas' Plain Bagel Thins and other products bear the American Heart Association Heart-Check Mark, which is alleged to be an undisclosed paid endorsement that violates federal and California law;
- The labels of Defendant's Sara Lee 100% Whole Wheat Bread and other products claim that each is an "Excellent Source of Whole Grain," and labels of Defendant's Sara Lee Soft & Smooth Whole Grain White Bread, Sara Lee Classic 100% Whole Wheat Bread, and other products claim that each is a "Good Source of Whole Grains." It is alleged that Defendant is barred from making these claims under federal and California law;
- The labels of Defendant's Sara Classic 100% Whole Wheat Bread, Sara Lee 100% Whole Wheat Bread, and other products represent that each is made of "100% Whole Wheat," when they are partially made with non-whole wheat flour. It is alleged that Defendant is barred from representing that such products are "100% whole wheat" under federal and California law;
- Defendant's Bimbo Original Toasted Bread and other products are labeled as "bread," but contain added coloring, which precludes these products from satisfying the FDA's standard identity for bread. It is alleged that, under federal and California law, such products cannot be labeled as "bread."

10. I understand that Plaintiffs seek certification of four classes under Federal Rule of Civil Procedure 23(b)(3), each of which includes consumers in California, who, since March 18, 2009, purchased specific products containing one of the four alleged misrepresentations discussed above.

11. Defendant recognizes that claims or representations on food labels, such as the ones discussed above, influence food sales and promotes the purported health benefits of the products in question. From an economic standpoint, Bimbo Bakeries would not continue to undertake the payments to the American Heart Association, or the manufacturing, advertising, and promotion of products labeled with the Heart-Check Mark

1 unless the benefits from doing so outweighed the costs of doing so. Bimbo Bakeries, as is
2 typically the case of manufacturers of food products, develops strategies in general which
3 serve to maximize profits as well as to minimize costs. In this instance, certainly one
4 motivation for the health and nutrition claims on food labels is the provision of
5 differentiated products from competitors consistent with the notion of the maximization of
6 profits. In fact, a number of economic studies in the extant literature deal with the impacts
7 of health and nutrition claims on food labels.¹

8 12. A number of recently conducted scientifically-based surveys support the
9 contention that labels matter to consumers. That is, labels indeed are material factors in
10 purchasing food and beverage products. To illustrate, a 2008 Health and Diet Survey
11 conducted by the Food and Drug Administration, based on a telephone survey of 2,584 non-
12 institutionalized adults (18+) in the 50 states and the District of Columbia found that: (1)
13 when buying a product for the first time, 77 percent of respondents reported reading food
14 labels often or sometimes to discern the list of ingredients and to obtain the nutrition
15 information; (2) 73 percent of respondents reported using food labels often or sometimes
16 to decide which brand to buy; (3) 85 percent of respondents reports using food labels often
17 or sometimes to get a general idea of nutritional content; (4) nearly half of the respondents
18 reported instances wherein the decision to buy food products within the most recent two-
19 week period were changed because of reading the nutrition label; and (5) 72 percent of
20 respondents reported using front-of-package (FOP) symbols often or sometimes when
21 making decisions to purchase food products.² Additionally, a recent Freeborn and Peters
22 Food Industry Team White Paper published in 2014 related that: (1) the number of
23 shoppers who say a no additives/preservatives claim is very important rose 10 percent
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25 ¹ Muth, M. K., C. Zhen, J. Taylor, S. Cates, K. Kosa, D. Zorn, and C. Choiniere, 2013. "The Value
26 to Consumers of Health Labeling Statements on Breakfast Foods and Cereals," *Journal of*
27 *Food Products Marketing* 19:279-298.

28 ² Choinière CJ, Lando A. Health and diet survey. 2008. Retrieved May 2010, from Food and
Drug Administration.

1 over the past two years; (2) natural claims now have greater appeal than organic and are
2 more strongly associated with no artificial flavors/colors/preservatives; this contention
3 was supported as well in a detailed 2008 study commissioned by Packaged Facts; and (3)
4 natural ingredients now rank third on the list of most looked for items on the ingredient
5 label, after type of fat/oil and sweeteners.³

6 13. A 2007 research study undertaken by the National Marketing Institute
7 ("NMI") primary consumer survey of 2,074 adults (18+) was conducted in July 2007
8 designed to measure and describe the marketplace for the U.S. Lifestyles of Health and
9 Sustainability ("LOHAS") products.⁴ The results of this survey were nationally projectable
10 to the U.S. adult population and were statistically valid at the 95 percent confidence level,
11 with a margin of error of +/- two percentage points. According to this NMI study, 85 percent
12 of adults indicated that the term "natural" meant 100 percent natural ingredients; 63 to 66
13 percent of adults that the term "natural" meant no artificial flavors, no artificial colors, no
14 additives, or no preservatives. Further, this study related that functional foods, defined as
15 those products with a specific health claim, have grown in favor among consumers. Notably,
16 the NMI study reported that package labels (and not television, radio, newspapers,
17 physicians, government agencies, consumer advocacy groups, friends/relatives, or the
18 internet or web sites) were the most important influence when purchasing foods and
19 beverages.

20 14. Finally, a recent *Consumer Reports* nationally representative telephone survey
21 of 1,004 adults, conducted April 17-21, 2014 with a margin of error of +/- three percentage
22 points at a 95 percent confidence level, related that close to 60 percent said they look for
23 the term "natural" on food labels when grocery shopping, while about two-thirds said that
24 the term means a product does not contain artificial ingredients, pesticides, or genetically-

26 ³ Sloan, Elizabeth, A., Top 10 Food Trends, Food Technology Issues, April 2011, Volume 65,
27 No. 4 also at, <http://www.ift.org/food-technology/past-issues/2011/april/features/food-trends.aspx?page=viewall>

28 ⁴ National Marketing Institute, 2007. Understanding the LOHAS Market Report, Sixth Edition.

1 modified organisms.⁵ Avoiding artificial ingredients such as preservatives, colors, or flavors
2 also was important to close to 70 percent of respondents.

3 15. Various approaches exist to establish the quantitative appraisal of damages
4 associated with the misbranding of the aforementioned food products. For purposes of the
5 calculation of damages associated with the misbranding of products, I assume that Plaintiffs'
6 allegations are true. Based on my review of all materials to date, several methods exist to
7 calculate damages to the proposed class using evidence that is predominantly common to
8 all class members.

9 16. I understand from Plaintiffs' counsel that Plaintiffs believe that class members
10 are entitled to a full refund of the purchase price of the products at issue. As discussed
11 below, such relief can be calculated by aggregating the total units sold in California with the
12 average retail price estimated over the class period.

13 17. Alternatively, should the Court determine that class members are entitled to
14 less than the full purchase price, there are several scientifically-based methods of
15 calculating the difference in value between what class members paid and what they
16 received. These methods include multiple regression analysis using both the hedonic and
17 before and after approaches as is detailed below. They include the analysis of the value of
18 product labeling characteristics (which calibrates differences in prices and sales of
19 products with and without the labeling claims at issue); and the analysis of incremental
20 sales revenues (which calibrates differences in prices and sales of the products at issue
21 during the time in which they have been labeled with the labeling claims at issue and prices
22 and sales of these products before the misrepresentations were placed on the labels, or
23 after they were removed).

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28 ⁵ Consumer Reports National Research Center Survey Research Report, Food Labels Survey
2014 Nationally-Representative Phone Survey.

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Retail Price Damages

18. Plaintiff is also pursuing claims for restitution of the purchase price paid by the Class Members for the misbranded products. These methods of calculating damages can be arrived at using retail or wholesale weighted average prices of the products and units sold in California over the class period.

Full Purchase Price Restitution

19. The Plaintiffs claim, under California law, that the misbranding of the product makes the product worthless. I understand that a misbranded product is illegal to sell, purchase or possess and therefore, from a legal standpoint, has no value. The aggregate damages to the Class can be determined from the retail sales data in the possession of the Defendant or obtained from third party vendors who provided this information to Defendant and other retailers. These third party vendors include Information Resources, Inc. (IRI) and Nielsen, who provide point-of-sale retail price data.⁶ Restitution is the return of the weighted average purchase price to the Plaintiff and members of the class, which can be determined in alternative ways. This measure can be calculated using scientifically sound economic and statistical principles to account for variations in prices charged by retailers. The information needed to perform these calculations is possessed by the Defendant and/or is available from the third party vendors. With such information, I can fully perform the necessary damages calculations.⁷ The retail price measure will rest on the use of weighted average prices available from Defendant and or the third party vendor data previously described and the number of units sold by Defendant in California over the class period.

20. The calculation of damages under the full purchase price restitution approach will involve calculating total units sold and weighted average price per unit paid by

⁶ A list of Multi-outlets associated with the use of the IRI data is contained in Appendix D of this declaration.

⁷ Our analysis of the data provided by Defendant is in process, and we will update our data requests if we find that there are additional data items required to complete our analysis.

1 consumers in California over the class period.

2 **Restitutionary Disgorgement**

3 21. Restitutionary disgorgement is another way to determine the relief to which
4 class members are entitled. Here, the loss suffered by class members (the retail price) is
5 necessarily greater than revenues or profits received by Defendant at the wholesale level.
6 Therefore, if class members are unable to establish the full extent of their loss at the retail
7 level, they can establish a “floor” for the relief to which they are entitled because their actual
8 retail loss is no less than the amount received by Defendant at the wholesale level.

9 22. Revenues or profits received at the wholesale level can be calculated directly
10 using Defendant’s revenues over the class period. These represent units sold multiplied by
11 the wholesale price per unit. Revenues or profits at the retail level can be calculated based
12 on the weighted average price per unit over the class period multiplied by units sold.

13 23. The only distinction between these measures is that the wholesale price per
14 unit will be lower than that average retail price per unit due to the markup that will be
15 added on by retailers to bring the wholesale price up to the retail price. Thus the loss to
16 class members at the wholesale level will be lower than the loss at the retail level based on
17 the average retail markup per unit multiplied by total units sold.

18 24. Data on wholesale revenues or profits could be obtained from Defendants and
19 data on retail prices and markups can be obtained from Defendants and third party vendors
20 such as IRI.

21 **Value of the Product Labeling Characteristic**

22 25. An alternative measure of the relief to which class members are entitled
23 would result from estimating the value of the labeling characteristic itself. This approach
24 refers to the principle that a buyer may recover from the seller as damages the value of
25 certain product characteristics such as the Heart-Check Mark that the product claims to
26 have but that in actuality does not. To illustrate, suppose that the retail price for one of
27 Defendant’s challenged product is \$1. If it is calculated that 10% of this price is attributed
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1 to the misrepresentation of the product through a false labeling claim, then the restitution is
2 10 cents. The value of the product labeling claim will be determined through the use of the
3 hedonic regression approach described below.

4 **Value of the Product Labeling Characteristic**

5 26. An alternative measure of restitution would result from estimating the value
6 of the labeling characteristic itself. This approach refers to the principle that a buyer may
7 recover from the seller as damages the value of certain product characteristics such as the
8 Heart-Check Mark that the product claims to have but that in actuality does not. To
9 illustrate, suppose that the retail price for one of Defendant's challenged product is \$1. If it
10 is calculated that 10% of this price is attributed to the misrepresentation of the product
11 through a false labeling claim, then the restitution is 10 cents. The value of the product
12 labeling claim will be determined through the use of the hedonic regression approach
13 described below.

14 27. The following facts are relevant to a damages calculation based on the retail
15 price. There is no bargaining or negotiating when consumers purchase food products from
16 retail establishments. Consumers in essence are price takers in these situations. Even if one
17 consumer bought more product than another consumer, the damage is common to the class.
18 Each stock-keeping unit ("SKU") has a unique universal product code ("UPC"), which is the
19 code recognized by scanners at the supermarket cash register that is used to determine the
20 price of the SKU. These prices in the "register" are the prices consumers paid at a given
21 point in time. Therefore, if one knows the "register" price for any SKU sold by the Defendant
22 in any given store on any given day, then one knows the price facing *all consumers* for that
23 item in that store in that time period. It is recognized that differences in retail prices may
24 exist across different stores in any given time period. To that end, a weighted average price
25 can be generated for any product on any given day. The weights to be used in this
26 calculation are the number of units sold of the products from the respective retailers on that
27 day. Consequently, this weighted average price constitutes the representative price for the
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1 product in any given time period. Importantly, this weighted average price is common to the
2 class of purchasers.

3 28. Consumers typically pay the common “register” price for goods purchased at
4 supermarkets and other food retailing establishments. I have no reason to believe this
5 situation would differ in this case. Simply put, consumers do not haggle or try to negotiate
6 individual prices as is common in other retail businesses. For example, car dealerships may
7 advertise a manufacturer suggested retail price (“MSRP”) for a particular car model, but the
8 actual price a consumer pays to purchase that model typically is negotiated individually.

9 29. Restitution can be calculated using either the retail price of the subject
10 products, as described above, or using the wholesale price of the subject products. Using
11 sales information directly obtainable from the Defendant, we are in position to calculate a
12 wholesale price which equals the sales of the Defendant to its distributors divided by the
13 number of units sold. This price could be calculated for any time period for the subject
14 products under scrutiny. In the event that data associated with retail prices of the
15 challenged products are not available, then the wholesale prices, derived using data from
16 the Defendant, with appropriate markups, can be used to arrive at the retail prices. Data on
17 retail food markups can be obtained from defendants or industry sources such as the
18 National Association of Convenience Stores or Food Marketing Institute and are common to
19 all class members.

20 30. Importantly, these proposed methodologies for calculating restitution not
21 only do not require any information specific to individual class members, but also are
22 consistent with the notion of rigorous scientific analyses. Additionally, these proposed
23 methodologies represent scientifically accepted quantitative methods in the calculation of
24 damages.

25 **Incremental Sales Revenues**

26 31. Another measure of the relief to which class members are entitled rests on
27 the portion of sales attributed to the misrepresentations by the Defendant. For example,
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1 with the use of this measure, the difference in the sales, revenues, or profits of the Bimbo
2 Bakeries products before and after the appearance of the labeling statement at issue on the
3 product can be calculated to determine damages. With knowledge of the sales figures for the
4 challenged products (figures in possession of the Defendant and third party vendors), and
5 when the labeling claims appeared on the product, class-wide damages can be calculated in
6 a straightforward manner. To illustrate, if the increase in sales of the Thomas' Plain Bagel
7 Thins before and after the Heart-Check Mark placed on the product is calculated to be 10%,
8 controlling for all other factors that may influence the difference in sales over this time
9 period, and if total retail sales of the challenged products amounted to \$100 million over the
10 class period, then the class-wide damages would total \$10 million.

11 32. With appropriate data, both the value of the labeling characteristic and
12 incremental sales damages methodologies can be used to determine damages associated
13 with partial restitution of the purchase price and most importantly, can be calculated using
14 data that is common to all class members.

15 33. It is important to note that both of these damage calculation approaches
16 should lead to similar estimates of damages because the value priced by consumers for the
17 labeling characteristic multiplied by the units sold is functionally equivalent to the value of
18 incremental revenues received from the labeling characteristic.

19 **Value of the Product Labeling Characteristic – Calculation Methodology**

20 34. The calculations method described below is designed to estimate the value of
21 the product characteristic such as the Heart-Check Mark and thus derive total damages by
22 using this information along with total units sold containing this characteristic over the
23 class period. To value the product labeling characteristics, before and after labeling
24 information would be very useful but not critical. However, for the incremental sales
25 methodology, also described below, data on revenues before and after the label change is
26 necessary to calculate damages.

27 35. To arrive at the partial purchase price restitution calculation by valuing the
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1 labeling characteristic or incremental sales or profits, the scientifically accepted
2 methodology is econometric or regression analysis. Regression analysis is a statistical tool
3 for understanding the relationship among two or more variables. With regression analysis,
4 it is possible to isolate the consequence of the alleged misrepresentation by controlling for
5 all other factors that may affect the price differentials, prices and/or volume sold of the
6 challenged products. Variables in econometric analyses often are quantitative measures like
7 price or quantity, common variables in economic analyses. Variables may also be categorical
8 in nature to represent events such as seasonal sales fluctuations, entry into markets, or
9 presence or absence of a food label.

10 36. Regression analysis involves the relationship between a variable to be
11 explained, known as the dependent variable, such as the quantity demanded of a particular
12 good or the price of a particular good, and additional variables that are thought to produce
13 or to be associated with the dependent variable, known as the explanatory or independent
14 variables. An error term, which represents all other factors not accounted for by the set of
15 explanatory variables, also is a fundamental component of the regression model. Regression
16 analysis may be useful in determining whether a particular effect is present as well as in
17 measuring the magnitude of a particular effect. As will be detailed below, regression
18 analysis is a scientifically accepted methodology used to isolate whether a particular
19 relationship exists between the dependent and explanatory variables and for measuring the
20 magnitude of this relationship while controlling for other factors that could also influence
21 the dependent variable.

22 37. The dependent variable used in the model that estimates the value of the
23 labeling characteristic corresponds to the prices of the identified or challenged products as
24 well as prices of comparable products. The type of regression methodology used to analyze
25 how consumers value different product characteristics is known as hedonic price analysis.⁸
26 With the use of this type of regression analysis, the supposition is that individual food
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28 ⁸ Abere, A., 2010. "Using Economics to Measure Damages in Private Advertising Litigation,"
The Adviser, 1, 1: 14-17.

1 products are composed of various attributes. The bundle of attributes defines the unit price,
2 which implies that product prices can be decomposed into implicit prices for individual
3 attributes. These implicit prices are called hedonic prices. Intrinsic values of the various
4 attributes may be recovered by specifying the prices of food products as a function of these
5 attributes. In this litigation, to implement the hedonic regression approach, we must
6 consider prices of the Defendant's products (with the labeling claim) as well as prices of
7 comparable products (with or without the labeling claim). In this way, with the hedonic
8 regression approach, we are in position to identify the impact of the labeling claim on the
9 prices of food products. In the hedonic regression approach, we center attention on pooling
10 prices of similar food products, some of which have labeling claims and some of which do
11 not. Simply put, controlling for other attributes in the regression analysis (e.g., brand,
12 package size, seasonality of prices, year-to-year fluctuations in prices attributed to
13 economic conditions), we may ascertain the impact of the labeling claim on prices of
14 particular food products.

15 38. The hedonic regression approach has been used extensively in economics,
16 dating back to the work of Waugh in the 1928 *Journal of Farm Economics*. Waugh observed
17 that prices of certain fresh vegetables varied considerably on the Boston wholesale market.⁹
18 As such, Waugh regressed these prices on various physical characteristics of the vegetables.
19 The name "hedonic pricing method" generally is attributed to A.T. Court (1939).¹⁰ Court
20 applied this method to automobiles and included several technical characteristics of the car
21 in the hedonic price analysis. Griliches (1961) revived the notion of the hedonic pricing
22 method, and this revival initiated a vast body of empirical work.¹¹

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24 ⁹ Waugh, F.V., 1928. "Quality Factors Influencing Vegetables Prices," *Journal of Farm Economics* 10: 185-196.

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26 ¹⁰ Court, A. T., 1939. "Hedonic Price Indexes with Automobile Examples" in *The Dynamics of Automobile Demand*, New York: The General Motors Corporation.

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28 ¹¹ Griliches, Z., 1961. "Hedonic Price Indexes for Automobiles: An Econometric Analysis of Quality Change," in *The Price Statistics of the Federal Government*, New York: Columbia University Press

1 39. Importantly, this methodology not only has been widely implemented in the
2 economic literature, but also this methodology has been implemented in situations
3 specifically related to labeling claims. To illustrate, Anstine (2007) used a hedonic
4 regression analysis to estimate the premium associated with yogurt labeled “All Natural.”¹²
5 The estimated premium associated with this “All Natural” claim was statistically significant
6 with the magnitude of the premium being approximately 34 cents per ounce controlling for
7 all brand and other labeling attributes. In percentage terms, this premium was on the order
8 of 40 percent. Li and Hooker (2009) investigated the use of food safety claims on new
9 packaged food products. Based on hedonic price models, they identified a significant 5 cent
10 premium per ounce for a “preservative free” claim in yogurts.¹³ Muth, *et. al* (2012)
11 estimated a semi-log hedonic price regression for five breakfast bar and cereal product
12 categories using Nielsen Scantrack scanner data for 2004.¹⁴ They found that labeling
13 statements for these products often were associated with substantially higher prices. Xiao
14 (2012) analyzed price differentials attributable to observable characteristics of retail milk
15 and oatmeal using the hedonic pricing methodology.¹⁵ Satimanon and Weatherspoon
16 (2010) determined price premiums of sustainable attributes for fresh eggs by using hedonic
17 analysis. Welfare-managed eggs had a notable premium equal to 3.57 cents per egg.¹⁶
18 Combris, Lecoq, and Visser (1997) used the hedonic pricing methodology to study the price-

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20 ¹² Anstine, J., 2007. “Organic and All Natural: Do Consumers Know the Difference?,” *Journal of Applied Economics and Policy* 26, 1: 15-27.

21 ¹³ Li, J. and N.H. Hooker. 2009. “Documenting Food safety Claims and Their Influence on
22 Product Prices,” *Agricultural and Resource Economics Review*, 38,3: 311-322.

23 ¹⁴ Muth, M. K., C. Zhen, J. Taylor, S. Cates, K. Kosa, D. Zorn, and C. Choiniere, 2013. “The
24 Value to Consumers of Health Labeling Statements on Breakfast Foods and Cereals,” *Journal of Food Products Marketing* 19:279-298.

25 ¹⁵ Xiao, J. 2012. “A Hedonic Analysis of Retail Milk and Oatmeal Attributes in Quebec,”
26 Department of Agricultural Economics, McGill University, Montreal.

27 ¹⁶ Satimanon, T. and D.D. Weatherspoon, 2010. “Hedonic Analysis of Sustainable Food
28 Products,” *International Food and Agribusiness Management Review*, 13, 4: 57-74.

1 quality relationship associated with Bordeaux wine.¹⁷

2 40. With the implementation of the hedonic regression model, the following null
3 and alternative hypotheses can be tested statistically: (1) Null hypothesis: Labeling claims
4 concerning the Heart-Check Mark no relationship to prices of Defendants' products that
5 contain these labels; and (2) Alternative hypothesis: Labeling claims involving the Heart-
6 Check Mark are positively associated with the prices of Defendant's products that contain
7 these labels. This methodology is a revealed preference approach in that actual prices are
8 used in the analysis rather than stated willingness-to-pay elicited from experiments or
9 surveys of hypothetical purchase decisions.

10 41. Relevant to this litigation, several recent studies from the academic literature
11 have dealt with the determination of consumers' willingness to pay ("WTP") for functional
12 foods. The term functional food is used to describe a range of novel foods which are
13 designed to deliver some other added benefit beyond those generally attributed to that type
14 of food (The Institute of Food Technologies). Health attributes can be interpreted as a
15 characteristic of any food. Moro, Sckokai, and Veneziani (2012) conducted a stated-choice
16 experiment in June 2011 on a sample of 600 Italian consumers in order to elicit the WTP for
17 yogurt enriched with catechines (natural phenolic compounds that are a source of
18 antioxidants).¹⁸ These researchers also found that the estimated average WTP was 40
19 percent. That is, this sample of Italian consumers was willing to pay on average a 40 percent
20 price premium for yogurt enriched with catechines. Hirogaki (2013) surveyed the
21 preferences of 270 students of economics in Hiroshima in April/May 2012 to determine
22 their WTP for foods labeled with specified health uses.¹⁹ He also found that this sample of
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24 ¹⁷ Combris, P., S. Lecoq, and M. Visser, 1997. "Estimation of a Hedonic Price Equation for
25 Bordeaux Wine: Does Quality Matter?," *The Economic Journal*, 107, 441: 390-402.

26 ¹⁸ Moro, D., P. Sckokai, and M. Veneziani, 2012. "Consumers' Willingness to Pay for a
27 Functional Food," Paper Prepared for Presentation at the 1st AIEAA Conference, Towards a
28 Sustainable Bio-Economy: Economic Issues and Policy Challenges

¹⁹ Hirogaki, M, 2013. "Estimating Consumers' Willingness to Pay for Health Food Claims: A
Conjoint Analysis," *International Journal of Innovation, Management, and Technology*, 4,6: 541-
546.

1 Japanese consumers were willing to pay on average a 20 percent price premium for foods
2 labeled with specified health uses. Miskolci (2011) analyzed selected studies pertaining to
3 WTP on the part of consumers in the Czech Republic for improvements in food quality,
4 guaranteed food quality, and for functional food. Consumers from the Czech Republic were
5 willing to pay on average an 11.2 percent premium for food quality improvement, a 12.3
6 percent to 15.4 percent premium for guaranteed food quality, and a 15.6 percent premium
7 for functional foods.²⁰ Marosyan, Wahl, and McClusky (2007) measured consumers'
8 response to apples with "naturally enriched antioxidant coatings" based on surveys
9 conducted in grocery stores in Seattle, Washington and in Spokane, Washington. It was
10 estimated that consumers, on average, were willing to pay a four percent to eight percent
11 premium for apples with "naturally enriched antioxidant coatings."²¹ Finally, Mayen (2013),
12 using conjoint analysis based on surveys of the U.S. population, found that labeling packages
13 of tree nuts (almonds, pecans, walnuts, and pistachios) with the language "High in
14 Antioxidants" positively influenced consumer preferences.²²

15 42. To invoke this methodological approach in measuring damages, it is
16 necessary to collect information covering the period the class period concerning the prices
17 of Defendant's products under question versus those from similar products but without the
18 false and misleading misrepresentations. The source of the data to be used in the
19 regression analysis is likely to be either Defendant or a third party vendor such as
20 Information Resources, Inc., ("IRI"). The relevant IRI category in this litigation pertains to
21 the specific products at issue in this matter. Weekly information by Universal Product Code
22 ("UPC") and by brand for the relevant time period will provide metrics of dollar sales, unit
23

24 ²⁰ Miskolci, S., 2011. "Consumer Preferences and Willingness to Pay for the Health Aspects of
25 Food," *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 54, 4: 167-175.

26 ²¹ Markosyan, A., T. I. Wahl, and J. J. McCluskey, 2007. "Functional Foods in the Marketplace:
27 Willingness to Pay for Apples Enriched with Antioxidants," Selected Paper Prepared for
Presentation at the AAEA Annual Meeting, Portland, OR.

28 ²² Mayen, P. D., 2013. "Influence of Antioxidant Information on Consumer Preference for Tree
Nuts," Working Paper, New Mexico State University

1 sales, and volume sales. Volume sales take into account differences in product size, whereas
2 unit sales refer simply to the number of units sold. In order to calculate prices for each of
3 the UPCs in this analysis, dollar sales will be divided by volume sales to derive prices,
4 expressed in terms of dollars per standardized unit.

5 43. The IRI data contain information related to sales from multi-outlets
6 exclusively in California. We plan to use such data to calculate a percentage of product value
7 attributed to the allegedly illegal claims. Then using data obtained from the Defendant, we
8 plan to apply the aforementioned calculated percentage change to net sales or gross profits
9 of the Defendant to arrive at damages. Additional data outside the scope of IRI will be
10 gathered concerning the consumer price index for California in order to make adjustments
11 in inflation of prices.

12 44. To operationalize the hedonic regression approach, similar to Muth, *et.al*, we
13 plan to specify a semi-log regression of the subject product prices; the respective prices
14 serve as the dependent variables in the hedonic regression. The blue print for action
15 subsequently is described as follows: natural logarithm of price=f(package size, brand,
16 presence or absence of labeling claim, inflation, seasonality, year-to-year effects, and
17 product characteristics). Because the presence or absence of the labeling statement is a
18 binary (dummy variable), the coefficient associated with this variable can be interpreted as
19 the percentage change in the price of the product attribute to the labeling claims while
20 controlling for all of the factors discussed above.²³ This model specification is not only
21 consistent with the extant literature but also consistent with Rubinfeld's (2000) reference
22 guide on multiple regression. Rubinfeld (p. 181) states that "multiple regression may be
23 useful in measuring the magnitude of a particular effect." The effect in this litigation is the
24 percentage of the price attributed to the alleged illegal labeling practices.²⁴

26 ²³ Muth, M. K., C. Zhen, J. Taylor, S. Cates, K. Kosa, D. Zorn, and C. Choiniere, 2013. "The
27 Value to Consumers of Health Labeling Statements on Breakfast Foods and Cereals," Journal of
28 Food Products Marketing 19:279-298.

²⁴ Rubinfeld, D. L., 2000. "Reference Guide on Multiple Regression," in Federal Judicial Center,
DECLARATION OF DONALD M. MAY
CASE NO. CV13-01196-HSG (NC)

1 45. The following variables corresponding to individual UPCs will be constructed
2 for the hedonic regression analysis: (1) price—the dependent variable for the hedonic
3 regression in dollars/standardized unit for each UPC in logarithmic form (constructed by
4 dividing dollar sales by volume sales); (2) package size—in reference to product weight per
5 package. The focus on package size represents allows the testable proposition of price
6 discounts associated with larger packages. Package size has been shown in the economic
7 literature previously discussed to impact prices of various food products; (3) seasonality—a
8 set of quarterly dummy variables designed to capture effects on prices quarter-to-quarter
9 within a year. The variables q1, q2, q3, and q4 take on two values, either 0 or 1. To illustrate,
10 q1=1 if quarter=1; q2=1 if quarter=2, q3=1 if quarter=3, and q4=1 if quarter=4. The
11 reference category for seasonality is the fourth quarter. This designation is arbitrary and
12 does not affect the econometric results; (4) year—a set of dummy variables designed to
13 capture effects on prices year-to-year over the sample period. The variables year_2009,
14 year_2010, year_2011, year_2012, year_2013 and year_2014 take on two values, either 0 or
15 1. For example, year_2009=1 if year=2009. The reference category for year is 2014.²⁵ This
16 designation also is arbitrary and will not affect the econometric results; (5) the variable
17 labeling claim corresponds to a dummy variable, 1 if the allegedly illegal statement appears
18 on the label and 0 if not. The reference category is that the labeling claim does not appear on
19 the label; (6) brand—dummy variables designed for the various brands to capture
20 differences in prices based on brands; (7) product characteristics—various dummy
21 variables constructed to capture qualitatively the impact of product characteristics on
22 prices; and (8) the consumer price index for the state of California used to deflate or adjust
23 for inflation the prices of all respective UPCs.

24 46. The subsequent task is to assess damages associated with the misbranding of
25 the challenged products over the class period and for the state of California. To carry out
26

27 Reference Manual on Scientific Evidence, pp. 179-227.

28 ²⁵ The year dummy variables also act as a control in part for income because any purchases associated with changes in income for consumers in a particular year will be captured by this variable.

1 this assessment, for each UPC corresponding to the Defendant's products, we will multiply
2 the respective percentage changes attributed to the labeling claims by the sum of the
3 corresponding Defendant sales.

4 47. The use of hedonic regression as well as before and after regression will
5 permit the test of the hypothesis that the percentage of the price associated with the label
6 claims at issue is positive and statistically significant. Moreover, from the review of the
7 academic literature previously described concerning the use of conjoint analysis, we also
8 know that indeed consumers are willing-to-pay a premium for health benefits attributed to
9 food products.

10 48. Importantly, the difference (or percentage difference) in representative prices
11 between Defendant's products with the allegedly illegal labelling and defendant as well as
12 comparator products without the allegedly illegal labelling, controlling for other factors,
13 would not vary from one consumer to the next. Additionally in using the hedonic regression
14 approach based on the retail data from Information Resources, Inc., mainstream vendors of
15 scanner data, I can calculate class-wide damages over the class period.

16 49. Once the value of the labeling claim is calculated, the total units sold over the
17 class period can be used to calculate total damages over the entire class period. For
18 example if the value of the Heart-Check Mark is found to be 10% of the purchase price and
19 total sales over the class period are \$100 million for these products, then damages are \$10
20 million.

21 50. The above example also illustrates that damages calculated using the value of
22 the labeling claim damages approach are equivalent to damages associated with
23 incremental sales, however, with sufficient data an incremental sales calculation can also be
24 performed directly as described below.

25 **Incremental Sales – Calculation Methodology**

26 51. To measure damages under the Incremental Sales Approach, regression
27 methodologies will also be implemented. The same scientifically accepted regression
28

analyses described above will be implemented.

52. However, under this approach data on units sold before and after the labeling claim will be used to directly estimate incremental sales associated with each particular claim.

53. Historical data on total sales before and after a particular labeling claims will be gathered and included in a regression equation that will then be used to determine the trend in sales for the particular products of interest over a sufficient time period that includes periods when the labeling claims existed and did not exist.

54. This particular regression would have a measure of sales or sales growth as the dependent variable and include indicator or dummy variables to note the dates of labeling changes.

55. With the implementation of the incremental sales regression model, the following null and alternative hypotheses can be tested statistically: (1) Null hypothesis: Labeling claims concerning the Heart-Check Mark no relationship to incremental sales of Defendants' products that contain these labels; and (2) Alternative hypothesis: Labeling claims involving the Heart-Check Mark are positively associated with the incremental sales of Defendant's products that contain these labels.

56. Under this approach for example, if the regression equation shows that the trend in sales has increased by 10% as a result of the particular labeling claim and total sales of that product are \$100 million then total damages under the incremental sales approach would be \$10 million.

Conclusion

57. In my opinion, aggregate class-wide relief can be calculated using scientifically well-established economic and statistical principles and methodologies, using factual information and data that are readily available from the Defendant and/or third party sources.


58. As I have detailed above, damages can be calculated under the full purchase

1 price restitution, restitutionary disgorgement, as well as partial restitution approaches
2 using data that is common to all class members..

3 59. Importantly, these proposed methodologies for calculating damages do not
4 require any information specific to individual class members. At the same time, they are
5 consistent with the notion of rigorous analyses. Additionally, these proposed methodologies
6 represent scientifically accepted quantitative methods in the calculation of damages.

7 60. In reaching my opinion, I relied on my education and experiences at various
8 well-respected universities (namely the University of Chicago and the Massachusetts
9 Institute of Technology), over 25 years of analysis that I have performed related to
10 damages, the Second Amended Complaint, excerpts from the Defendant's website, and
11 knowledge of the existence of data from the Defendant and from third-party vendors such
12 as IRI. I reserve the right to change my opinions should new information come to light in
13 this litigation.

14 61. I declare under penalty of perjury that the foregoing is true and correct. This
15 declaration was executed on the 18th day of February, 2015.

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19 _____
20 Dr. Donald M. May
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Appendix A – References

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Donald M. May

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EDUCATION

MBA (Finance) University of Chicago, 1987

CPA (Illinois) State of Illinois, 1985

SUMMARY

Dr. May has prepared expert reports and testified in federal and New York State courts as well as AAA and FINRA arbitration hearings and has also effectively worked as an expert witness consultant in several multi-million dollar cases.

Dr. May has been published in several distinguished academic and practitioner journals such as *The Journal of Finance* and is an editorial board member of *The Journal of Business Valuation and Economic Loss Analysis*.

Some examples of recent matters Dr. May has been asked to evaluate, analyze and/or opine on include:

- Damages related to leveraged buyout (“LBO”) financing practices
- Fraudulent conveyance and solvency analysis related to the financing of an LBO
- Valuation of damages from alleged theft of trade secrets
- Assessment of the conclusions and methodologies used to calculate damages by opposing experts
- Valuations of intangible assets for the purpose of calculating damages from alleged theft
- Calculation of damages related to securities fraud under SEC 10b-5
- Valuation of over 200 closely held businesses across numerous industries for financial reporting and estate planning

EMPLOYMENT HISTORY

DMA Economics LLC – Managing Partner, 2015 to present, New York, NY

Berkeley Research Group – Managing Director and Independent Contractor, 2013 to present, Litigation and Corporate Financial Advisory Services New York, NY

Grassi & Company – Principal and Practice Leader in Charge of Forensic, Litigation Support and Valuation Services, 2012 – 2013, Litigation and Corporate Financial Advisory Services New York, NY

Marks Paneth & Shron LLP – Director, , 2010 – 2012, Litigation and Corporate Financial Advisory Services New York, NY

Experts-On-Experts LLC – Managing Partner, 2007 – 2009, Litigation Support, New York, NY

Analysis Group – Vice President, Inc., 2006-2007, Litigation Support and Expert Witness Testimony, New York, NY

NERA Economic Consulting – Senior Consultant, 2004-2006, Securities Practice, Complex Commercial Claims Valuation, New York, NY

Peripheral Vision LLC – Managing Partner, 2002-2004, New York, NY

PricewaterhouseCoopers LLP – Managing Director, 1998-2002 Financial Advisory Services, Corporate Value Consulting and Business Recovery Services, New York, NY

Massachusetts Institute of Technology Sloan School of Business – Assistant Professor of Management, 1993-1998, Cambridge, MA.

Loyola University of Chicago – Adjunct Professor of Finance, Econometrics, and Economics, 1991-1993, New York, NY

PUBLICATIONS

“Using Ex-ante and Ex-post Benchmarks in Estimating Damages” – *The Value Examiner*, May/June 2012

“Surviving Daubert: Bad Benchmarking Puts Cases at Risk Expert Witnesses Misstep by Using the Wrong Benchmarks to Calculate Damages”, *Wall Street Lawyer*, December 2011

“Factors to Consider When Hiring an Expert” *Claims Journal*, May 26, 2011

“As Traditional Methods Fail in a Flood of Bad News, Courts Should Turn to Techniques Used by Investment Analysts to Calculate Shareholder Damages” *Securities Litigation Report*, January, 2011, Volume 8, Issue 1

1 “Strategies for Avoiding Valuation Disputes in Connection with Breakups of Hedge Fund General
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3 “Wall Street Style Valuation Assumptions Are Popular & Often Wrong – Discounted Cash Flow
4 Methodology Give Litigators the Upper Hand” *Securities Litigation Report*, May 2010, Volume 7,
Issue 5

5 “Getting the Most from Technology: Keys to Better Decision-Making,” *American Banker*, March
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8 “The Performance of Firms Before and After They Adopt Accounting-Based Performance Plans”
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Finance*, vol. 41, issue 2 (2001)

10 “The Effectiveness of Long-Term Accounting-Based Incentive Plans” (with Chandra S. Mishra
11 and David H. Gobeli), *Journal of Managerial Issues*, Volume XII, Number 1 (Spring 2000)

12 “Do Managerial Motives Influence Firm Risk Reduction Strategies?” *Journal of Finance* (1995)

13 “Federal Reserve Discount Rate Changes and Market Reaction,” *Journal of Macroeconomics*
14 (Spring 1992)

15 **GRANTS AND AWARDS**

16 University of Chicago, Graduate School of Business, PhD Fellowship, 1989-1993

17 Nanyang Technological University Teaching and Research Chair (first MIT Sloan School of
18 Management junior faculty member to receive this endowed teaching and research chair),
19 1994-1997

20 MIT Leaders for Manufacturing Summer Teaching Award, 1995

21 Recipient, 1989 - 1992 University of Chicago PhD Grant and stipend

22 **AFFILIATIONS**

23 Editorial board for the Journal of Business Valuation and Economic Loss Analysis

24 American Finance Association

25 American Economic Association

26 American Accounting Association

27 Certified Public Accountant (CPA), State of Illinois, 1985

1 **Appendix C**

2 **A List of Cases in which Dr. May Has Provided Expert Testimony at Trial or at**
3 **Deposition over the Past Four Years**

4 *TomTom International, B. V. v. Broadcom Corporation, In the United States District Court Central*
5 *District of California, Southern Division, Case No. 8:14-CV-00475*

6 *Jared Gabriele, individually and on behalf of all others similarly situated v. Conagra Foods Inc., In*
7 *the United States District Court for the Western District of Arkansas Fayetteville Division , Case No.*
8 *14-5183 TLB*

9 *Brenna Center, individually and on behalf of all others similarly situated, v. Ocean Spray*
10 *Cranberries, Inc. The United States District Court For The Western District of Arkansas Fayetteville*
11 *Division, Case No. 5:14-cv-05211-TLB*

12 *Blue Bank International N.V. formerly known as Premier Bank International, v. HSBC Securities*
13 *(USA) Inc.; HSBC Bank USA N.A.; and Mark Richard Corbet Yale, Miami, Florida, FINRA Case No.*
14 *12-02582*

15 *Infini Communications LLC, v. Communication Service for the Deaf Inc., Circuit Court of Cook*
16 *County, Illinois, Chicago Illinois, Case No. 12-L-4502*

17 *Edgar H. Bachrach, Sally B. Robinson, and Barbara B. James, v. Bachrach Clothing Holding*
18 *Company, Sun Bachrach, LLC, Sun Capital Partners III QP, LP and Sun Capital Partners, Circuit*
19 *Court of Cook County, Illinois, Chicago Illinois, Case No. 08-L-013712*

20 *Ronald M. Tate, Trustee of the Ronald M. Tate Trust Dtd 4/13/88, and George Avakian, v. E*TRADE*
21 *Financial Corporation, Mitchell H. Caplan, and Robert J. Simmons, United States District Court,*
22 *Southern District, New York, Case No. 08 Civ. 7296 (JPO)*

23 *Liquid Realty Advisors III LLC et al. v. Jeffrey Giller et al., American Arbitration Association, San*
24 *Francisco California, Case No. 74 166 00369 12 AMCH*

25 *Brandon Scott, individually and on behalf of all others similarly situated, v. Conagra Foods, Inc., In*
26 *the Circuit Court of Washington County, Arkansas, Case No. CV 14-1119-7, filed June 20, 2014*

27 *Colby Center, individually and on behalf of all others similarly situated, v. Conagra Foods, Inc., In*
28 *the Circuit Court of Washington County, Arkansas, 5th Division, Case No. CV 14-1118-5*

ZBD Constructors Inc. f/k/a Zurn Balcke-Durr, Inc. v. Billings Generation Inc. and Yellowstone
Energy Limited Partnership, United States Southern District of New York, Case No. - 1: 09 CV 6667
(NRB) (AJP) ECF)